



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

SUBCONTRACTOR'S CLAIM FOR CUMULATIVE LABOR INEFFICIENCY
GRANTED IN PART: March 13, 2012

CBCA 1460

WALSH/DAVIS JOINT VENTURE,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Martin R. Salzman of Hendrick Phillips Salzman & Flatt PC, Atlanta, GA, counsel for Appellant.

Dalton F. Phillips, Leigh Erin S. Izzo, and Heather R. Cameron, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STERN**, and **HYATT**.

DANIELS, Board Judge.

The General Services Administration (GSA) contracted with Walsh/Davis Joint Venture (WDJV) to construct a complex of buildings in Washington, D.C., to serve as the headquarters of the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives. In November 2004, WDJV subcontracted with AES Electrical, Inc. d/b/a/ Freestate Electrical Construction Company (Freestate) to perform electrical work on the project. Until November 2006, each and every modification of the GSA/WDJV contract which affected Freestate's work included a sentence which read, "Settlement of this change includes all costs, direct, indirect, and impact and delay associated with this change." The

parties have asked us to determine whether this sentence precludes recovery, under a claim Freestate later made, and WDJV submitted to GSA, for the costs of cumulative labor inefficiencies which were allegedly incurred as a result of changed work addressed in the modifications.

Beginning in November 2006, contract modifications affecting Freestate's work included a different sentence. The new sentence stated that in accepting the modification, WDJV did not release GSA from various costs, including those incurred due to labor inefficiency. The parties have agreed that WDJV is entitled to recover for the cost of Freestate's cumulative labor inefficiencies which resulted from the changed work addressed by these later modifications. The parties have further agreed on the amount of that recovery. Thus, the agency has acknowledged that the Freestate claim should be granted in part. In this decision, we consider whether the claim should be granted further – as to the portion stemming from the inefficiencies resulting from the changed work addressed in the modifications which contain the sentence on which we focus our attention.

Earlier, in ruling on a motion for summary relief submitted by GSA on this matter, we explained the law which is relevant to the dispute. We held that because “the sentence is unambiguous in precluding further efforts to recover ‘direct, indirect, and impact and delay [costs] associated with’ each of the affected contract modifications,” WDJV cannot pursue the claims for Freestate's inefficiencies relating to the modifications unless it can demonstrate one of the “special and limited situations in which a claim may be prosecuted despite the execution of a general release.” These “special and limited situations” include two which WDJV believes were present here: First, the modifications failed to express the agreement of the parties – something which, if a material mistake can be proved by clear and convincing evidence, justifies reforming the writing to express the agreement. Second (actually a variant of the first), by continuing to consider the claim after execution of the release, the parties manifested an intent not to construe the release as an abandonment of the claim. *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799. In response to GSA's motion for summary relief, WDJV, through affidavits, asserted facts sufficient to defeat the agency's contention that no material facts as to these situations were in dispute. We therefore denied the motion. *Id.*

Both parties appear to take issue with the understanding of the law we enunciated in the earlier decision. WDJV attempts to avoid our conclusion that the sentence is unambiguous by asserting, with reference to parol evidence, that no meeting of the minds ever existed as to the meaning of the term “associated with this change.” *Bell BCI Co. v. United States*, 570 F.3d 1337 (Fed. Cir. 2009), precludes us from considering this position. In that case, the trial court concluded, based on its view of the evidence, that the language of the release at issue must not have applied to a cumulative impact claim because the parties

never had a meeting of the minds as to such an application. The Court of Appeals held, however, that because the language was unambiguous, an examination of extrinsic evidence was not permissible. The language of the modifications we consider here – settlement of each change includes all costs, including impact costs, associated with the change – is similarly unambiguous, so we do not consider extrinsic evidence in interpreting it.

Further, we do not agree with WDJV that because the cumulative impact on efficiency stems from all changes taken as a whole, and is not “associated with” any particular change alone, the preclusive language in the modifications cannot apply to a cumulative impact claim. Both parties acknowledge that changes made by GSA to contract work had a cumulative impact on Freestate’s labor efficiency. Some of that impact resulted from changed work as to which contract modifications included the sentence we focus on here. Some of it resulted from changed work as to which modifications did not include the sentence, but rather, preserved the contractor’s right to seek impact costs. The parties have concluded that separating the impacts of the two groups of changes is possible, and evaluating the claim in that manner is reasonable.

In implicitly taking issue with our explanation of the law, GSA maintains that “*Bell BCI* controls the issues at bar.” This is true to a considerable extent, but it ignores the “special and limited situations” cited by our appellate authority in *J. G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 806-07 (1963), and referenced in other decisions of that court which we cited – *Howmedica Osteonics Corp. v. Wright Medical Technology, Inc.*, 540 F.3d 1337, 1348 (Fed. Cir. 2008); *National Australia Bank v. United States*, 452 F.3d 1321, 1329 (Fed. Cir. 2006); *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir. 1993); and *Winn-Senter Construction Co. v. United States*, 75 F. Supp. 255 (Ct. Cl. 1948). *Bell BCI* did not overrule (or even address) any of these decisions. We continue to believe that our formulation of the law was correct and therefore proceed to consider evidence as to the “special and limited situations” that WDJV maintains were present here.

We afforded the parties an opportunity to present, through a hearing, evidence as to these matters. WDJV called as witnesses three officials of Freestate – Susan Gaughan and Larry Clark, the subcontractor’s project managers, and Charles Wooldridge, the subcontractor’s vice-president. WDJV also called Vincent Michalesko, the contractor’s project manager. GSA called as witnesses two GSA officials – Vincent Matner, the contracting officer for the project, and Jean Hundley, the agency’s project manager. Each of the witnesses was shown various documents and asked about them, and each was subject to cross-examination.

We first examine WDJV’s contention that the sentence in the modifications failed to express the agreement of the parties. As far as the contractor’s understanding is concerned,

the evidence bears out the contention. The evidence clearly shows that Freestate went into negotiations for every change order expecting that it might later make a claim for labor inefficiency. Each request states that it “set[s] forth only the direct cost for performing the . . . work” and that the subcontractor “reserves its rights to assert any and all claims for . . . loss of efficiency . . . and/or other impact costs occurring because of (a) the changed work, whether by itself or in a combination with other items; (b) the pre-change order events and activities; or (c) the impact of the changed work on unchanged work.” Further, discussions about the requests with GSA’s Mr. Hundley and personnel from the agency’s onsite representative (Gilbane Building Company) involved direct costs only. We appreciate the testimony of Freestate’s officials that the company could not price cumulative labor inefficiencies at the time it submitted the requests because the cost of those inefficiencies could not be known until after all (or virtually all) of the work had been performed. We also credit the testimony of WDJV’s project manager that WDJV would not have certified claims which included the claims of various subcontractors (including Freestate) for cumulative labor inefficiency unless WDJV believed that those claims had been reserved.

In evaluating the agreement of the parties, however, we must also consider GSA’s intent. The testimony of the witnesses presented by WDJV gives little insight into this subject. The contractor’s best evidence came from WDJV project manager Michalesko, who told us that he “was under the understanding from the very start, that impacts and inefficiencies were handled separately in this REA [request for equitable adjustment] process.” This understanding was never documented anywhere, however. Similarly, the testimony that the November 2006 change in the language of contract modifications (to include a specific reservation of rights as to claims including those for inefficiency) is not supported by any documentation. Given the importance of the alleged understandings and the great experience of both parties in construction contracting, we would have expected those understandings to be put into writing.

The only documentary evidence we have which might pertain to separate consideration of a labor inefficiency claim relates to two REAs from Freestate which addressed compensation for inefficiency. The first of these was dated March 2, 2005. WDJV asked Freestate to remove the cost item for labor inefficiency, and the subcontractor did so after having been assured by WDJV that it would be considered elsewhere. This \$13,178 charge was not for cumulative impact, however, but rather, for direct impact of the change at issue. As GSA project manager Hundley explained, the item was not appropriate in the context of the proposal, which was for time-related costs. And there is no proof that GSA directed that the item be removed from the request or agreed to consider the item elsewhere, as WDJV said it would.

The second piece of documentary evidence which might bear on GSA's intent to consider a Freestate cumulative labor inefficiency claim separately is an August 2006 REA which was negotiated with GSA's Mr. Hundley. The negotiators lined through two cost items and the total amount sought and replaced each of them with a lesser number. The negotiators did not line through, however, the paragraph in which Freestate reserved its rights to assert a claim for loss of efficiency. Mr. Hundley explained, without contradiction, that the failure to line through the paragraph did not mean that the agency was agreeing to consider such a claim later. He testified that if the parties had agreed to a reservation of rights, they would have written a note to that effect on the proposal.

The testimony of GSA's two witnesses does not support WDJV's contention that the agency joined in the contractor's understanding that cumulative labor inefficiency claims could be presented later, notwithstanding the key sentence in the contract modifications. Contracting officer Matner did not provide any helpful testimony. He explained that he did not negotiate any of the modifications; he delegated to project manager Hundley the responsibility for conducting the negotiations and did nothing more than sign whatever Mr. Hundley presented to him. Mr. Hundley testified that the sentence meant that each modification was a "total settlement" which "gave a full release to GSA"; "[w]e were resolving the total price." Cumulative labor inefficiencies were not discussed during the negotiations, he said, because the sentence to be included in the modifications was "all-inclusive." Under cross-examination, Mr. Hundley may have betrayed a lack of comprehension as to the meaning of the term "cumulative labor inefficiency," but he never varied from the mantra that each contract modification was "all-inclusive" of costs relating to the affected work. Mr. Hundley also disagreed with the contractor witnesses' testimony that the November 2006 change in the language of the modifications was meant to incorporate prior understandings.

We recognize that in light of the flimsiness of the testimony of GSA's witnesses, it is difficult to determine whether the parties ever had a meeting of the minds as to the meaning of the sentence on which we focus our attention. *Bell BCI* instructs us, however, that once we have concluded that the meaning of the sentence is unambiguous, that meaning must be enforced unless the party challenging it can prove that the parties intended something different. *See* 570 F.3d 1346 (Newman, J., dissenting). WDJV has not proved that here, so its contention must fail.

The contractor's other asserted "special circumstance," that by continuing to consider the claim after execution of the release, the parties manifested an intent not to construe the release as an abandonment of the claim, is not proven, either. WDJV submitted four significant REAs to GSA in the course of this project. All but REA III included cumulative labor inefficiency claims by subcontractors; REA IV included Freestate's cumulative labor

inefficiency claim. The parties discussed REA I, but there is no evidence that they specifically addressed any cumulative labor inefficiency claims in the course of their conversations. Mr. Hundley testified that he reviewed the REAs only in cursory fashion, and there is no evidence that GSA ever considered the inefficiency claims in any detail. GSA did ask its Office of Inspector General (OIG) to audit the Freestate portion of REA I, which included a cumulative inefficiency claim (not the one we consider here, which was part of REA IV). As to that particular claim, the OIG reported, "Labor inefficiencies cost has been disallowed pending a qualified technical analysis." We have no information as to what this means; no witness explained the sentence, and no OIG representative was called to testify.

The only evidence that GSA ever truly considered the cumulative inefficiency claims is that on June 7, 2010, the parties filed with the Board a motion for stipulated award in which they asked us to issue a decision awarding to WDJV \$1,434,544 regarding inefficiency claims brought by WDJV on behalf of itself and six subcontractors. (The Board granted the motion by decision dated June 8, 2010.) The fact that GSA agreed to this award does not show that the agency did not construe the release as an abandonment of the claims, however. The settlement agreement includes this paragraph:

It is agreed that this Settlement Agreement is a compromise and settlement of the disputed claims set forth in Exhibit 1 [which lists various delay and inefficiency claims]. It is not intended to constitute, and shall not be construed as constituting, either an admission of lack of merit of any claim made by any Party or an admission of fault or wrongdoing by any Party. This Agreement shall not be used as evidence in any other claims, demands or causes of action which Walsh/Davis may have against GSA stemming from the Contract, including but not limited to any claims for delays, inefficiencies and impacts.

With exceptions not relevant here, Federal Rule of Evidence 408 prohibits the use of evidence about conduct or statements made during compromise negotiations about a claim. We consequently cannot look behind the agreement to learn what motivated it. *Advanced Cardiovascular Systems, Inc. v. Medtronic, Inc.*, 265 F.3d 1294, 1308 (Fed. Cir. 2001). We do not know whether GSA agreed to the settlement because it considered the award to relate only to labor inefficiencies associated with later contract modifications that did not include the sentence at issue here, or in recognition of litigative risk, or for some other reason.

Decision

We have no evidence on which to find that the unambiguous meaning of the sentence in the contract modifications does not reflect the agreement of the parties at the time the modifications were written or in the course of consideration of the contractor's claims.

Therefore, we conclude that contractor WDJV is not entitled to recover from GSA on subcontractor Freestate's claim for cumulative labor inefficiencies associated with the modifications which include that sentence. The parties have agreed that WDJV is entitled to recover on Freestate's claim for cumulative labor inefficiencies associated with the modifications which do not include the sentence. The appeal is therefore **GRANTED IN PART** – only to the extent that it addresses inefficiencies associated with the later modifications. Otherwise, it is denied.

STEPHEN M. DANIELS
Board Judge

We concur:

JAMES L. STERN
Board Judge

CATHERINE B. HYATT
Board Judge